Case No. 82-5909

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ANTHONY RAY PEEK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

EDWARD S. STAFMAN
224 West Fourth Avenue
Tallahassee, Florida 32303
(904) 222-5029

ATTORNEY FOR PETITIONER

Supreme Court of Florida

No. 54,226

ANTHONY RAY PEEK, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[October 30, 1980]

PER CURIAM

Appellant Anthony Ray Peek was convicted of first degree murder, sexual battery, grand larceny and burglary. The jury recommended and the trial judge imposed a sentence of death on the murder charge. Jurisdiction vests in this Court pursuant to article V, section 3(b)(1), Florida Constitution. We affirm the conviction and sentence.

Erna L. Carlson returned to her home in Winter Haven, Florida, following a visit with relatives at approximately 9:00 p.m. on May 21, 1977. At 8:30 a.m. the following morning, Mrs. Carlson's body was discovered in her bedroom with her robe and part of a bedspread tied tightly around her neck. The screens on the door to the porch and on the door leading from the porch to the house had been cut, and a piece of stocking containing a strand of negroid hair was found in the garage. The victim's pajama bottoms contained blood and seminal fluid stains. No fingerprints were found in the house.

On May 22, 1977, police located Mrs. Carlson's automobile at a lakeside park approximately one mile from her home. The door to the driver's side was locked, the passenger door was not.

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The keys to the automobile were in the glove compartment. Fingerprints were found on the inside of the driver's side window.

Prompted by allegations that Peak had been going door to door seeking employment in the Winter Haven area, Officer Donnelly of the Winter Haven Police Department interviewed him several days after the murder. Appellant lived in a supervised halfway house at the time of the crime. He told Donnelly that he had returned to the halfway house before 11:00 p.m. on the night of May 21, 1977, and had not been in the vicinity of Mrs. Carlson's home or of the lakeside park. Appellant voluntarily permitted the taking of his fingerprints and the extraction of hair samples. The hair samples were sent to the Sanford Crime Lab for comparison but were lost subsequent to the testing.

Appellant was tried in the Circuit Court for Polk County on April 10, 1978. Dr. Luther Youngs testified that Mrs. Carlson died of strangulation. She also had been raped and had suffered two fractured ribs. An employee from the Sanford Crime Lab testified that the hair samples obtained from appellant were consistent in microscopic appearance to the hair found in the stocking at the scene of the crime. Although it is never possible to say that two hairs are identical, the hairs of only approximately two out of every 10,000 persons exhibit consistent microscopic characteristics. The blood and seminal fluid stains taken from Mrs. Carlson's pajamas were from an individual with type O secretor blood; appellant is a type O secretor. The evidence further revealed that the fingerprints found inside Mrs. Carlson's car matched those of appellant.

Appellant took the stand and, with one significant exception, reiterated the account first given to Officer Donnelly. He contradicted, however, his prior assertion that he was not in the area where the victim's car was found on May 22, 1977. Appellant testified instead that on that morning he rode his bicycle to the lakeside park. Noticing a car parked nearby with

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the door unlocked, he opened the door and searched the glove compartment, after which he rode his bicycle back to the halfway house.

The jury found appellant guilty of all four offenses and returned a recommended sentence of death on the murder charge. Prior to sentencing, defense counsel's motion for appointment of experts to examine appellant as a mentally disordered sex offender was denied. On May 2, 1978, the court adjudged appellant guilty and sentenced him to death for first-degree murder. The court also imposed a life sentence for the sexual battery and a term of five years each for grand larceny and burglary, to run consecutively.

I

Appellant challenges his conviction on essentially three grounds. He first asserts that the prosecution failed to establish an adequate chain of custody of his hair samples. The evidence at trial revealed that on July 7, 1977, Officer Latner received four hair samples from appellant which he sealed in four separate plastic bags. The samples were transferred to the Sanford Crime Lab. Diana Bass, a microanalyst at the Sanford Lab, testified that in December of 1977 she received several sealed plastic bags containing negroid hair. The transmittal sheet accompanying the bags noted that the samples were from Anthony Ray Peek. The bags did not appear to have been "opened, tampered with, or in any way adulterated."

Relevant physical evidence is admissible unless there is an indication of probable tampering. Frederiksen v. State, 312 So.2d 217 (Fla. 3d DCA 1975); Stinson v. State, 228 So.2d 294 (Fla. 3d DCA 1969). Accord, United States v. Daughtry, 502 F.2d 1019 (5th Cir. 1974). The record here reflects no hint of tampering, thus the trial judge did not abuse his discretion in permitting the introduction of the hair comparison analysis.

Appellant's assertion that he was denied due process by introduction of the hair samples because their subsequent loss

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prevented an independant inspection is similarly unavailing. While there is support for the proposition that a criminal defendant must have an opportunity to inspect physical evidence which is to be used against him, Brady v. Maryland, 373 U.S. 83 1963); Barrard v. Henderson, 514 F.2d 744 (5th Cir. 1975); Johnson v. State, 249 So.2d 470 (Fla. 3d DCA 1971), cert. discharged 280 So.2d 673 (Fla. 1973), such a right, like most others, may be waived. In this case appellant made demand for discovery of reports and results of scientific tests and experiments, to which the state responded with a list of the hair samples and lab reports. Appellant did not, however, move the trial court to inspect or test the hair specimens. He cannot now claim entitlement to a right which in the first instance he chose to forego.

Appellant next contends that the evidence failed to establish his guilt beyond a reasonable doubt. He properly cites McArthur v. State, 351 So.2d 972 (Fla. 1977), prohibition denied sub nom. McArthur v. Kourse, 358 So.2d 132 (Fla. 1978), vacated and remanded on other grounds sub nom. McArthur v. Kourse, 438 U.S. 902 (1978), for the proposition that circumstantial evidence will not sustain a conviction unless it is inconsistant with any reasonable hypothesis of innocence. Accord, Davis v. State, 90 So.2d 629 (Fla. 1956). In applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Mayo v. State, 71 So.2d 899 (Fla. 1954); Bolton v. State, 87 Fla. 68, 99 So. 244 (1924).

The case against appellant is concededly circumstantial. But we are satisfied that, when considered in combination, the evidence relating to the matching fingerprints, the hair comparison, and the blood and semen analysis enabled the jury to reasonably conclude that appellant's guilt was proven beyond a reasonable doubt. Moreover, appellant's only reasonable hypothesis of innocence, that he entered the victim's car at the lakeside park the morning following the murder, was

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effectively discredited by Officer Connally's account on rebuttal of appellant's original assertion that he had never been in the vicinity of the park. In view of this prior inconsistent statement, the jury was justified in disbelieving appellant's version of events.

We have considered the remaining issues related to appellant's conviction, but find them to be without merit.

II

Turning to the sentencing phase of the trial, we must first consider whether the trial court abused its discretion in denying defense counsel's motion for appointment of experts to examine appellant as a mentally disordered sex offender. Section 917.14, Florida Statutes (1977), provides:

> 917.14 Certifying defendant for hearing.
> (1) If a defendant has been convicted of or has pleaded guilty or no contest to an offense or attempted offense in a current prosecution, the court may defer sentencing and certify him for a hearing and examination in the circuit court to determine whether he is a mentally disordered sex offender.
> (2) The court may certify a defendant under subsection (1) on its own motion, on motion by the State Attorney or the defendant, or on application by affidavit of the defendant.

By the act's express terms, certification under section 917.14 is discretionary. Failure to certify will not be error unless the record reveals a clear abuse of judicial discretion. LeDoc v. State, 365 So.2d 149 (Fla. 1978); Huckaby v. State, 343 So.2d 29 (Fla. 1977). No such error has been demonstrated in this case.

In its charge to the sentencing jury on the proper consideration of aggravating and mitigating circumstances, the trial court instructed that "[t]he aggravating circumstances which may be considered, are limited to such of the following as may be established by the evidence . . ." and "[t]he mitigating circumstances, which you may consider if established by the evidence, are these . . ." (emphasis supplied). Appellant maintains that this charge unconstitutionally limited jury consideration of mitigating factors to those statutorily enumerated. We do not agree.

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Perhaps the clearest and most constant principle emanating from the sometimes obscure light of Furman v. Georgia, 408 U.S. 238 (1972), and its progeny is that unbridled discretion in sentencing capital defendants begets arbitrary and discriminatory application of the death penalty. We are told that at least three justices in Furman believed the death penalty unconstitutional because:

> discretionary sentencing, unguided by legislatively defined standards, violated the Eighth Amendment because it was "pregnant with discrimination," id., at 257 (Douglas, J., concurring), because it permitted the death penalty to be "wantonly" and "freakishly" imposed, id., at 310 (Stewart, J., concurring), and because it imposed the death penalty with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not," id., at 313 (White, J., concurring).

Lockett v. Ohio, 438 U.S. 586, 599 (1978). It appears incontestable, then, that to a large extent "the sentencing authority's discretion [must be] guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt v. Florida, 428 U.S. 242, 258 (1976).

Recurring to the charge given in this case, we note at the outset that it in no way restricts the jury to a consideration of the statutorily enumerated mitigating circumstances. Indeed, the instruction on mitigating circumstances, when read in conjunction with the express limitation on consideration of aggravating circumstances, advises the jury that the list of statutory mitigating factors is not exhaustive. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (on rehearing). It strikes a constitutional balance by directing, but not limiting, scrutiny to those areas of mitigation considered vital by the legislature in determining the fairness of a life or death sentence, thereby assuring that the death penalty will be applied in a consistent and rational manner.[1] Were we to sanction an instruction which

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[1] "It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193 (1976).

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established no effective guidance for the jury in considering circumstances which may mitigate against death, we would surely breathe life into Mr. Justice Rehnquist's admonition that such a procedure would "not guide sentencing discretion but [would] totally unleash it." Lockett v. Ohio, 438 U.S. at 631 (Rehnquist, J., concurring in part and dissenting in part).

Contrary to appellant's assertion, the instruction given here is consistent with Lockett v. Ohio. Lockett holds only that a sentencing body must not be precluded from considering, as a mitigating factor, aspects of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. As noted above, our death penalty statute does not limit consideration of mitigating circumstances to those statutorily enumerated.[2] Moreover, unlike the Ohio statute invalidated in Lockett, the mitigating circumstances in Florida's statute direct the jury's attention to many aspects of the defendant's character and the circumstances surrounding the offense.[3] While we do not contend that the statutory mitigating circumstances encompass every element of a defendant's character or culpability, we do maintain that the factors, when coupled with the jury's ability to consider other elements in mitigation, provide a defendant in Florida with every opportunity to prove his or her entitlement to a sentence less than death.

The trial judge made these findings of fact in support of the death sentence:

> As to Count One of the Indictment, wherein the Defendant was convicted of First Degree Murder, the Court makes the following findings of fact:
>
> 1. As an aggravated circumstance under Florida Statute 921.141(5)
>
> (a) The capital felony of Murder in the First Degree was committed by Anthony Ray Peek while he was on probation on two charges

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[2] Section 921.141(1), Florida Statutes (1977), provides that during the sentencing proceeding, "evidence may be presented as to any matter that the court deems relevant to sentence . . . ."

[3] See, e.g., § 921.141(6)(a), (6)(d), (6)(g), Fla. Stat. (1977).

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of Burglary, one count of Grand Larceny and two charges of Petit Larceny, having been placed on said probation on November 15, 1976, for a period of five (5) years. Copy of the Order of Probation in Case No. CF76-1842 is attached hereto and marked "Exhibit A".

(b) The defendant was previously convicted in Polk County, Florida, on December 15, 1977, of three charges, to-wit: Burglary, Sexual Battery and Robbery, and was on the 4th day of April, 1978, sentenced to life imprisonment on the Sexual Battery charge and fifteen (15) years on each of the Burglary and Robbery charges to run consecutively with the life sentence. A copy of the Judgment and Sentence in this case is attached and marked "Exhibit B"; that the conviction for the felonies contained in the Information in Case No. CF77-1658 involved the use or threat of violence to the victim.

(c) The Court finds that the facts of this case do not support the aggravated circumstances in Florida Statutes 921.141 (5)(c) in that the Defendant did not knowingly create a great risk of death to many persons, other than the victim.

(d) The capital felony, the murder of Erna L. Carlson, was committed while the Defendant was actively engaged in the commission of the sexual battery of Erna L. Carlson.

(e) This Court finds that the facts of this case do not support the aggravated circumstances in Florida Statutes 921.141(5)(e) in that this capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) This Court finds that the crime was committed by Anthony Ray Peak for pecuniary gain by ransacking the victim's purse, obtaining the keys to a motor vehicle, the property of Erna L. Carlson, and then stealing said motor vehicle.

(g) This Court finds that the facts of this case do not support the aggravated circumstances in Florida Statutes 921.141(5)(g) in that the capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) This Court finds that this capital offense was especially heinous, atrocious and cruel in that evidence at the trial shows that the sixty-five year old victim, Erna L. Carlson, received extensive blows to her head and body, broken ribs, a crushed larnyx, and was strangled by the use of clothing and bedclothes wound around her neck and tied to the headboard of a bed. According to expert medical opinion, the victim suffered tremendous excruciating pain while being raped and killed.

2. As to mitigating circumstances in Florida Statutes 921.141(6)

(a) The Court finds that the Defendant, ANTHONY RAY PEEK, did have a history of prior criminal activity and, therefore, rejects Florida Statutes 921.141(6)(a) as a mitigating circumstance.

(b) The Court finds that this capital offense was not committed while the Defendant was under extreme mental or emotional disturbance and, therefore, rejects Florida Statutes 921.141(6)(b) as a mitigating circumstance.

(c) The victim, Erna L. Carlson, was not a participant in the Defendant's acts of Burglary, Grand Larceny, Sexual Battery and Murder in the First Degree, and this Court expressly rejects this subsection, Florida Statutes 921.141(6)(c) as a mitigating circumstance.

(d) The Defendant acted alone in the commission of these offenses and the Court expressly rejects subsection 921.141(6)(d), Florida Statutes, as a mitigating circumstance.

(e) The Defendant, ANTHONY RAY PEEK, did not act under extreme duress or under the domination of any other person and the Court expressly rejects subsection 921.141(6)(e) as a mitigating circumstance.

(f) The Defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired, and the Court expressly rejects subsection 921.141(6)(f), Florida Statutes, as a mitigating circumstance.

(g) Finally, the age of the Defendant, ANTHONY RAY PEEK, has been considered as required by subsection 921.141(6)(g) of the Florida Statutes. The Defendant was twenty (20) years old at the time of the offense and his age is rejected as a mitigating circumstance.[4]

In conclusion, the Court finds that there are sufficient aggravating circumstances to justify the imposition of the death penalty. There are no mitigating circumstances. The evidence clearly demonstrates that Erna L. Carlson was the victim of a cold, cruel and heartless killer.

Appellant argues that his age at the time of the commission of the crime should have been considered a mitigating factor.[5] There is no per se rule which pinpoints a particular age as an automatic

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[4] The judge subsequently corrected this finding to show that appellant was nineteen at the time of the crime, although his conclusion that Peek's age was not a mitigating circumstance did not change.

[5] § 921.141(6)(g), Fla. Stat. (1977).

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factor in mitigation. The propriety of a finding with respect to this circumstance depends upon the evidence adduced at trial and at the sentencing hearing. Compare Roy v. State, 353 So. 2d 826 (Fla. 1977), with Songer v. State, 322 So. 2d 481 (Fla. 1975). The trial judge expressly considered but rejected appellant's age as a mitigating factor. The record supports his finding.

Appellant contends it was error to regard appellant's probationary status as being within the aggravating circumstance set forth in section 921.141(5)(a), Florida Statutes (1977), which allows consideration as an aggravating circumstance the fact that the capital felony was "committed by a person under sentence of imprisonment." The appellant asserts that a grant of probation is not a sentence of imprisonment because a probationer is not in prison confinement. Under the facts of this case, we agree an individual on probation and not incarcerated is not under a sentence of imprisonment.

Probation is a sentence alternative but is not generally considered to be a sentence of imprisonment. An exception arises, however, if the order of probation includes as a condition a term of incarceration and the capital felony is committed while the defendant is or should be incarcerated. We find that the phrase "person under sentence of imprisonment" includes (a) persons incarcerated under a sentence for a specific or indeterminate term of years, (b) persons incarcerated under an order of probation, (c) persons under either (a) or (b) who have escaped from incarceration, and (d) persons who are under sentence for a specific or indeterminate term of years and who have been placed on parole. Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in section 921.141(5)(a). Consequently, this aggravating circumstance was improperly found in the instant case.

The trial court further found as an aggravating circumstance that appellant had been convicted of felonies "involving the use or threat of violence to the person."

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§ 921.141(5)(b), Fla. Stat. (1977). Appellant urges that since these prior convictions were on appeal at the time of sentencing, they cannot be considered "convictions" for purposes of section 921.141(5)(b). We disagree. Appellant had previously been convicted of burglary, sexual battery, and robbery. They were on appeal at the time of sentence and were subsequently affirmed. Peek v. State, 374 So. 2d 106 (Fla. 2d DCA 1979). These were in fact convictions at the time of sentencing. Because these convictions were affirmed, their consideration by the trial judge in the instant case was proper. We do not have the problem which would arise from the consideration as an aggravating circumstance of a conviction valid at the time of sentencing, that is subsequently reversed and vacated by an appellate court.

The appellant next contends the trial court was also in error in finding that the capital felony was committed for pecuniary gain. § 921.141(5)(f), Fla. Stat. (1977). Although it appears that appellant ransacked Mrs. Carlson's purse and made off with her automobile, there is no evidence that any money or household belongings were taken. The record does not support the conclusion that Mrs. Carlson was murdered to facilitate the theft, or that appellant had any intention of profiting from his illicit acquisition. The more reasonable inference is that appellant stole the car in order to quicken his escape from the scene of the murder. Considering all the circumstances, the evidence linking the murder to a motive for pecuniary gain is insufficient to establish this aggravating factor beyond a reasonable doubt.

The trial court's findings with respect to the two remaining aggravating circumstances are fully justified by the record. It is unrefuted that the capital felony was committed during the commission of a sexual battery. § 921.141(5)(d), Fla. Stat. (1977). Further, the medical testimony clearly establishes that Mrs. Carlson's horrible suffering at the hands of her attacker was "especially heinous, atrocious, or cruel." § 921.141(5)(h), Fla. Stat. (1977). Thus, we have two clearly valid aggravating circumstances, one contested but valid aggravating circumstance, and no mitigating circumstances. We

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find that the trial court's improper consideration of the two aggravating circumstances concerning pecuniary gain and commission of the offense while on probation does not render the sentence invalid. Harvgrave v. State, 366 So. 2d 1 (Fla. 1978); Elledge v. State, 346 So. 2d 998 (Fla. 1977). Upon an independent review, we find the evidence and record clearly justify the imposition of the death sentence.

Accordingly, the judgment of guilt and sentence of death are affirmed.

It is so ordered.

ADKINS, BOYD, OVERTON and ALDERMAN, JJ., and VANN, Associate Justice, Concur
SUNDBERG, C.J., Dissents with an opinion
ENGLAND, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

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STATE v. [illegible]

SUNDBERG, C. J., dissenting.

I respectfully dissent from the majority's affirmance of appellant's conviction. While I am not unmindful of the atrocities committed upon the victim in this case and the principle of law that even in a capital case a conviction may be based wholly upon circumstantial evidence, nevertheless, pursuant to the obligation imposed upon me by section 921.141(4), Florida Statutes (1977), and Florida Rule of Appellate Procedure 9.140(f), I have reviewed the evidence in this cause and determine that the interest of justice requires a reversal. In my mind the evidence is insufficient to prove beyond a reasonable doubt that appellant was the perpetrator of this heinous crime. The hair, blood and semen analysis coupled with the fingerprints found in the victim's automobile are simply insufficient to support the conviction, in view of the statistical probability of the occurrence of like-type hair, blood and semen in the population and the inability of the state to establish that the fingerprints were placed in the automobile at the time the crime was committed. State v. Hayes, 333 So.2d 51 (Fla. 4th DCA 1976); Williams v. State, 308 So.2d 595 (Fla. 1st DCA 1975), Cert. denied 321 So.2d 555 (Fla. 1975); Wilkerson v. State, 232 So.2d 217 (Fla. 2d DCA 1970). Appellant explained the presence of his fingerprints in the automobile and that they were placed there the morning after the crime. This testimony was discredited by testimony of Officer Donnelly to the effect that appellant had made a previously inconsistent statement. However, Officer Donnelly's testimony did not serve to place appellant's fingerprints in the automobile at the time the crime was committed or at a time shortly thereafter. His testimony was nothing more than impeachment.

Accordingly, based on the evidence in this record, I feel compelled to reverse the judgment of conviction.

Furthermore, I dissent from several conclusions reached by the majority with respect to application of section 921.141(5)(a), Florida Statutes (1977). First, I reject the majority's conclusion that section 921.141(5)(a) permits

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consideration of a defendant's probation status at the time of commission of a homicide. That section provides that it is an aggravating circumstance if the capital felony was "committed by a person under sentence of imprisonment." (Emphasis supplied.) A grant of probation is not a sentence of imprisonment whether incarceration is a condition of probation or not. The legislature has repeatedly and consistently distinguished between a sentence of imprisonment and probation. Compare chapter 948, Florida Statutes (1979) (probation) with chapter 947, section 947.16, Florida Statutes (1979) (sentence). It cannot be presumed that the legislature was unmindful of this distinction when it enacted section 921.141(5)(a). It may be that a person's actual state of incarceration or escape therefrom at the time of commission of a capital felony is just as valid a consideration for imposition of the death penalty whether that incarceration is by virtue of a sentence or as a condition of probation. Nevertheless, that is a legislative decision, and I would not presume to impute an intent to that body which is so contrary to its consistent delineation between sentence and probation.

Second, I cannot accept the proposition that a nonfinal conviction of a violent felony may be considered as an aggravating circumstance under section 921.141(5)(b), Florida Statutes (1977). This question has not previously been addressed directly by the Court. But see McCrae v. State, No. 45,894 (Fla. Oct. 30, 1980) (plea of guilty, as opposed to a nonfinal conviction, to a violent felony without adjudication of guilt an aggravating circumstance under section 921.141(5)(b)). For aid in determining what constitutes a "conviction" under this section, I would utilize the interpretation of that term under section 775.084, Florida Statutes (1975), our habitual offender statute, because the purposes of both that statute and section 921.141(5)(b) are similar--to enhance punishment due to prior criminal convictions. Under section 775.084, a prior conviction is not final until appellate review has concluded. Joyner v. State, 158 Fla. 806, 30 So.2d 304 (1947); Garrett v. State, 335 So.2d 876 (Fla. 4th DCA 1976); Coleman v. State, 281 So.2d 226

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(Fla. 2d DCA 1973). In view of the similarity in underlying philosophy between the two statutes, and in view of the awesome finality of the death penalty, I would hold that for purposes of section 921.141(5)(b) a prior conviction may not be utilized in aggravation until direct appellate review has concluded. I am unpersuaded by the majority's reliance on the fact that the convictions in this case were affirmed pending this appeal. What if they remained unresolved on the date of this opinion? It occurs to me that the wisdom upon which section 775.084 is bottomed should not be lightly regarded. Because of the unique attributes of the death penalty, we have engaged in a narrow construction of chapter 921 when a question as to its meaning has arisen. See Elledge v. State, 346 So.2d 998 (Fla. 1977) (section 921.141(5), Florida Statutes (1975), construed to permit only consideration of enumerated factors as aggravating circumstances). Adherence to this rule of construction indicates to me that finality of conviction for purposes of section 921.141(5)(b) should be at least as stridgent as for section 775.084, where the consequences are not nearly so grave.

ENGLAND, J., Concurs in so much of this dissent as would reverse appellant's convictions.

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IN THE SUPREME COURT

OF THE STATE OF FLORIDA

ANTHONY RAY PEEK, Petitioner,	:	
vs.	:	
	:	Case No.
STATE OF FLORIDA, Respondent.	:	

REQUEST FOR LEAVE TO FILE PETITION

FOR WRIT OF ERROR CORAM NOBIS

Petitioner, Anthony Ray Peek, moves this court for leave to file a petition for writ of error coram nobis in the Circuit Court, Tenth Judicial Circuit, of the State of Florida. This request is based upon the following grounds:

Introduction

1. Petitioner Anthony Ray Peek was convicted in the Circuit Court of the Tenth Judicial Circuit, Polk County, Florida, on April 13, 1978, of first degree murder, sexual battery, grand larceny, and burglary. On May 2, 1978, that court adjudged Petitioner guilty and sentenced him to death, a consecutive life sentence, and two consecutive five year sentences for the respective offenses.

2. On October 2, 1980, this Court, by a 5-2 margin,[1] affirmed the judgment and sentence of the trial court. Peek v. State, 395 So. 2d 492 (Fla. 1980). This Court has jurisdiction. Hallman v. State, 371 So. 2d 482 (Fla. 1979).

3. The State presented three pieces of evidence incriminating Petitioner at trial:

a. Blood and seminal fluid stains taken from the

[1] The tally of Supreme Court Justices was 4-2, with Associate Justice Vann joining the majority, and Justices Sundberg and England dissenting. The dissenting justices maintained, inter alia, that there was insufficient evidence to support the conviction.

victim's pajamas indicated the presence of type "O" secretor blood. According to the trial testimony, 33% of the population has type "O" secretor blood, including Petitioner.[2]

b. The victim's car was found the day after the crime approximately one mile from her residence at a park, and near her place of employment. Numerous fingerprints were found inside the car, including one that matched Petitioner's. Petitioner testified that, the morning after the crime, he saw the unlocked car while eating breakfast in the park at which the car was found, and he decided to "look around", probably with burglary in mind. However, he testified that there was nothing worth taking, and he left. This fingerprint explains how Petitioner became a suspect in the crime. It was the only positive evidence linking Petitioner to anything having to do with the crime, although it does not link him to the crime itself.[2A]

c. A piece of stocking containing a single fragment of a strand of negroid hair was found on the floor of the garage of the victim's home (although the victim's body was found in the bedroom). An employee from the Florida Department of Law Enforcement testified that hair samples obtained from Petitioner were microscopically consistent in appearance to the fragment found in the stocking. She further testified, as noted by this Court in its opinion, that "various studies by many persons now working in my field have determined that there is probably no more than two people out of every ten thousand persons who will exhibit exactly the same characteristics in their hairs" (R-453). We now know that the hairs examined were probably mixed up, the comparison was incorrectly done, and the statistics relied upon are "grossly in error".

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[2]We now know that 54% of the population could have left the stains. Because the victim was also blood type "O", the presence of the "O" factor could have come from her, and the person who left the stains could have been any blood type, non-secretor status. In total, 54% of the population could have left the stains. Nevertheless, this fact could and should have been discovered at the time of trial and thus, concededly, does not constitute a valid ground for the issuance of a writ of error coram nobis. Hallman v. State, 371 So. 2d 482 (Fla. 1979).

[2A]Petitioner's explanation was rebutted by Officer Donnelly who testified that Petitioner had previously told him that he (Petitoner) "had not been in the vicinity of the lakeside park (where the car was parked)." This seeming inconsistency is easily explained by the fact that Petitioner was new to Polk County and did not know the names of different areas. Thus, when Petitioner was asked at trial where he went after breakfast on the morning after the murder, he responded "a lake" (R-673). When asked, "What lake?", he said, "I don't know, you know, one from the other, because, you know, I am not from Florida." So, when Petitioner told the police officer that he had not been to the area referred to, he thought he was being truthful: he had been there, he simply did not know the name of the particular lake, of which there are many in Polk County.

Count I--The Employee Evaluation

4. The hose containing the hair fragment was received by the crime lab in June, 1977 (R-504-505). On July 7, 1977, Petitioner's hair sample was delivered to the lab along with samples from other persons. In December, 1977, some six months later, a hair sample which was purported to have come from Petitioner was received by the analyst (R-505-506). Nobody could testify where that hair sample was for those six months. Furthermore, the analyst did not say where or how the fragment was stored from the time it was discovered in June, 1977, until it was compared to the hair of Petitioner in December, 1977. This Court held that these failures in the chain of custody did not require reversal because there was no indication of "probable tampering". Newly discovered evidence reveals probable tampering. This same newly discovered evidence also reveals that the hair comparison was performed incorrectly and was based upon antiquated techniques.

5. This newly discovered evidence consists of an employee evaluation given the analyst about 2-3 months after trial (attached as Appendix "A"). It raises serious allegations of probable, though unintentional, tampering. Upon rating the analyst as "unsatisfactory" in evidence handling, the evaluation states:

> Evidence Handling
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> Evidence handling is one of Ms. Bass' most problematical areas. She does not appear to have the proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory table top overnight. This failure to protect the items by repackaging them when not actually involved in an analysis leaves a VERY STRONG PROBABILITY OF EXTRANEOUS CONTAMINATION, CROSS-CONTAMINATION AMONG ITEMS, and possible loss of trace evidence.[3]
>
> Ms. Bass fails to realize that the intergrity of the evidence must be maintained even after the

[3]This "very strong probability of extraneous contamination [or] cross-contamination" is even stronger when the subject of the analysis is hair because of the highly mobile nature of hair and the serious danger of mix-up therefrom. It is entirely possible that the analyst compared one of Petitioner's hairs to another of his hairs or that one of the items compared came (continued)

A15

> laboratory examination is complete. In a recent case, Ms. Bass conducted a paint comparison between an automobile fender and a bumper. At the conclusion of her laboratory examination, Ms. Bass stored these items of evidence outside in back of the laboratory in an unpackaged condition, and in an unprotected area, thereby subjecting them to the frequent rains occuring at that time of year. These items quickly became dirty and rusty before she was directed to protect them by the microanalysis section supervisor.

(Emphasis supplied.)

6. This raises the "very strong probability of" tampering, albeit unintentional. The evaluation also raises questions of equal seriousness regarding the analyst's abilities to perform a hair comparison.

> Job Skill Level
>
> Although Ms. Bass has approximately three years experience in the crime laboratory, her technical skills in the analysis of evidentiary materials is not commensurate with this time period. Although her skills in basic microscopy appear adequate for a first or second year microanalyst, she does not utilize the more advanced techniques that should have been acquired in three years. The fact that she uses a number of antiquated criteria for the analysis of hair, such as scale counting,[4] should be indicative of a lack of adequate background training in this area. Her general scheme for hair comparisons appears to be lacking in the detailed morphological description required for this type of examination. The failure to utilize the comparison microscope in this type of examination is considered to be a serious fault.
>
> Ms. Bass has not demonstrated the knowledge of instrumental methods of analysis usually observed in third-year microanalysts. A lack of knowledge and experience has been observed in her use of IR, PGC, AA, and other instrumental methods. The inability to choose appropriate methods of instrumental analysis and the lack of knowledge needed to competently perform these analyses should be considered an extremely serious deficiency.

(Emphasis supplied.)

7. The analyst lost the hair immediately subsequent to testing and so there is no opportunity now to go back and demonstrate conclusively that it was not consistent with Petitioner's. However, the evaluation shows that the analyst's continuous failure to properly care for the evidence, in the words of the Florida

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from another suspect, a lab employee, one of the black police officers at the scene, or one of the thousands of persons who could have left a hair on the floor of the victim's garage, such as service persons.

[4] This was the method utilized in this case.

Department of Law Enforcement supervisory personnel, "leaves a very strong probability of extraneous contamination, cross-contamination among items, and possible loss of trace evidence." Thus, Petitioner can now show, through this evaluation, probable tampering, albeit unintentional, with the evidence. Also, Petitioner can show that the analyst did not have the abilities to accurately perform an analysis. In a study published months after the trial, it was found that one of three inexperienced hair analysts misidentified common hair types.[5]

Count II--The Statistics

8. At the time of the trial, there was only one experiment in the field which purported to establish statistical probabilities for matching hair. This experiment arrived at a statistical probability of 1 in 4500 that two hairs will match. Based upon this experiment,[6] the analyst testified that "various studies by many persons[7] in my field have determined that there are probably no more than two people out of every 10,000 persons who will exhibit exactly the same characteristics in their hairs." Some months subsequent to trial, the author of this experiment significantly qualified it in a further work, and conceded that the statistics would not apply to a case such as this. Then, in April, 1982, the latest and only other article on the subject (attached as Appendix "C") concluded that the first experiment was totally incorrect:

---

[5]Petitioner can also show that the witness was seriously mistaken in her testimony that the fragment was consistent with Petitioner's hair in 30-35 characteristics. Only 20-25 such characteristics exist. Nevertheless, this knowledge was available at the time of trial, and, admittedly, is not a propert subject for a writ of error coram nobis. Hall v. State, supra.

Similarly, it was never pointed out at trial that the fact that the hose upon which the hair was found was found on the floor, a place where numerous hairs may be picked up. However, this, too, was a proper matter for trial, not for writ of error coram nobis.

[6]See affidavit (Appendix "B"). The affidavit states that the witness' testimony was based "primarily" upon this experiment. However, Petitioner is prepared to prove that no other experiment or study existed.

[7]This simply was not true, but, again, it was the duty of the public defender to cross-examine on it. He did not.

> In the seven years that have elapsed since the publication of the first article, there has been no attempt reported in the literature to confirm Gaudette's work or criticize his treatment of the data . . . . [The experiment] claims to provide first estimates of certain probabilities useful for the individualization of human scalp and pubic hair. Unfortunately, the probability estimates are GROSSLY IN ERROR because of experimental bias and improper statistical treatment of the data . . . . The probability estimates derived by Gaudette are not relevant to hair individualization.

(Emphasis supplied.) Thus, the testimony of the hair witness concerning probabilities has been completely discredited in the field and is not relied upon by hair experts.[8]

Coram Nobis Allegations

9. The various facts alleged in Counts I and II above can be proved through the use of the employee evaluation, and the recently published articles. These facts were not known, nor could they have been known at the time of trial, because the employee evaluation was created some months after the trial, the article qualifying the original experiment was published some months after the trial, and the latest article completely discrediting the first experiment was published in April, 1982.

10. The facts cited above are of such a vital nature that, had they been known by the trial court, they conclusively would have prevented the entry of judgment against Petitioner. Without the hair evidence and the statistical probabilities, the only evidence linking Petitioner to this crime is a fingerprint on a car found a mile away from the scene which Petitioner acknowledges he placed on the car the next morning while attempting to burglarize it, and about which there is no proof to the contrary, and blood and semen stains which could have been left by at least 33%, if not 54%, of the population.

11. Even if the facts cited above would not have conclusively

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[8] Of course, the lone experiment was not "various studies by many persons in my field," as the analyst testified. Nevertheless, this, too, should have been pointed out on cross-examination and is not a proper subject for error coram nobis.

prevented the entry of judgment against Petitioner, those facts would have been significant factors in determining Petitioner's guilt and the appropriateness of the death penalty in this case.

12. If this request is granted, Petitioner would file the Petition for Writ of Error Coram Nobis, attached hereto as Appendix "D", in the Circuit Court of the Tenth Judicial Circuit.

WHEREFORE, based upon the foregoing, Petitioner respectfully requests this Court grant him leave to apply for a writ of error coram nobis to the Circuit Court of the Tenth Judicial Circuit.

MEMORANDUM OF LAW

A petition for leave to apply for writ of error coram nobis lies in the appellate court which has previously entertained an appeal from the final judgment in the case and affirmed it by its mandate. Hallman v. State, 371 So. 2d 482 (Fla. 1979). The petition will be granted where new facts are alleged that could not have been known at the time of trial which are of such a vital nature that they conclusively would have prevented the entry of judgment. Id. Petitioner respectfully submits that, in cases where a death sentence has been imposed, the new evidence need not conclusively prevent judgment, but the petition should be granted where the new facts add a significant factor to the guilt or sentence. Hallman, supra (Justices Overton, Boyd, and Hatchett, concurring in part, dissenting in part). However, under either test, Petitioner maintains that he is entitled to relief.

A. Newly Discovered Evidence

The employee evaluation and the latest articles are newly discovered. They did not exist at the time of trial and, thus, Petitioner did not know, nor could have known, about them.

B. Conclusively Prevents Judgment Against Petitioner

Circumstantial evidence will not sustain a conviction unless it is inconsistent with any reasonable hypothesis of innocence. Peek v. State, supra; McCarther v. State, 351 So. 2d 172 (Fla. 1977). In this case, the blood and semen stains have almost no

probative value because half the population could have left them. Furthermore, it is well-settled that a fingerprint alone cannot sustain a conviction, unless it could have been left only during the commission of the crime. Williams v. State, 308 So. 2d 595 (Fla. 1st DCA 1975); Dickson v. State, 216 So. 2d 85 (Fla. 2d DCA 1968); Tirko v. State, 138 So. 2d 388 (Fla. 3d DCA 1962). Therefore, the hair evidence was the centerpiece of the State's case.

However, in light of the newly discovered employee evaluation, we now know that there is a "strong probability" that the wrong hair was examined and it is certain that the analyst used antiquated techniques and did not have the requisite abilities to perform the comparison.

Moreover, even if, against all of the odds, the correct hair was utilized, and the results of the comparison were accurate, there is no question that the statistics which played such a vital part in the minds of the jury and this Court have now been totally discredited.

The testimony of the hair expert that only 2 of 10,000 persons exhibit microscopically consistent characteristics in their hair presented admittedly substantial testimony. These statistics should never have been admitted into evidence because there was no foundation for the witness' knowledge, she was obviously not a statistician, and because statistical probabilities based upon unfounded experiments are not admissible. United States v. Massey, 594 F.2d 676 (8th Cir. 1979); State v. Scarlett, 426 A.2d 25 (N.H. 1981); Miller v. State, 399 S.W.2d 268 (Ark. 1966); People v. Collins, 438 P.2d 33 (Cal. 1968); State v. Sneed, 414 P.2d 858 (N.M. 1966); see Wright v. State, 351 So. 2d 1127 (Fla. 1st DCA 1977) ("criminal convictions cannot be based upon probabilities nor suspicions . . . ."); State v. Horvatch, Case No. 82-251 (4th DCA May 5, 1982) (it is improper to expose a jury to what seems to be "scientific proof," but really is not); Tribe, Trial by Mathematics, 84 Harv. L. Rev. 1329, 1375-76 (1971).[9]

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[9] Indeed, in Massey and Scarlett, the Eighth Circuit and New Hampshire Supreme Court reversed convictions where probability statistics from the same hair experiment were used at trial.

Petitioner has filed a petition for writ of habeas corpus in this Court, alleging ineffective assistance of appellate counsel for his failure to raise this plain error which would have required reversal. Should this Court deny that petition and thereby hold that the "probability" evidence was properly admitted, it must allow for newly discovered scientific evidence which disproves the original antiquated scientific beliefs.

The jury undoubtedly accorded this "probability" evidence great weight, as did the majority of this Court, which believed it to be, perhaps, the strongest evidence against Petitioner. The prosecutor argued it strenuously in his closing argument (R-722-724) and the State argued these probabilities heavily to this Court in its brief. State's Brief at 2, 5. Assuming, arguendo, that the correct hair was utilized and it was compared correctly, without the statistics, the evidence consists of an explained fingerprint, blood and semen that could have been left by half the population, and a hair that could have come from Petitioner, as well as any other number of persons, perhaps anyone else. This clearly does not point to Petitioner's guilt, or even the possible guilt of a limited class of persons, but, rather, could point to thousands of persons. Thus, without the probability testimony, which would be eliminated by the admission of the newly discovered evidence, judgment in favor of Petitioner is mandated.

Thus, the employee evaluation and the new articles conclusively require judgment in favor of the Petitioner. Without the evidence concerning hair comparison and/or probabilities concerning hair comparisons, the State's case fails to establish Petitioner's guilt beyond a reasonable doubt, or, for that matter, even by a preponderance of the evidence. However, if this Court believed that without the hair evidence, there is still sufficient circumstantial evidence upon which a jury could have convicted Petitioner, this request to file for error coram nobis should nevertheless be granted because the new evidence is substantial and definitely affects the judgment and sentence of death. Petitioner should not be put to death where his conviction is based in a large

part on scientific evidence, which, subsequent to trial was disproved, and upon one witness who probably utilized contaminated evidence and performed inaccurate and antiquated tests. To deny Petitioner the right to raise this vital evidence would clearly violate his right to due process of law. As the United States Supreme Court wrote in Lockett v. Ohio, 438 U.S. 586, 605 (1978):

> The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases.

Because of the uniqueness of capital cases, due process demands that newly discovered evidence which could vitally affect the judgment or sentence be considered by the courts. Of course, Petitioner maintains that the newly discovered evidence conclusively requires judgment in his favor. But, even if this Court disagrees, it must be considered where it could easily change a jury's mind on the question of reasonable doubt. And, when two of this Court's Justices have dissented based upon insufficiency of the evidence, substantial new evidence per se can make the difference on the reasonable doubt issue. If the evidence is not considered, Petitioner could then be executed where a reasonable doubt exists in violation of Petitioner's due process rights. See Jackson v. Virginia, 443 U.S. 307 (1979).

The recent discovery of the evidence discussed herein demonstrates that Petitioner's conviction was based on unreliable and incorrect evidence and antiquated scientific theories. He has been denied a fair trial, due process of law, the effective assistance of counsel at trial, and to have issues supporting a capital conviction reliably determined, guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Petitioner's rights under the Eighth and Fourteenth Amendments as expressed in Lockett, supra; Furman v. Georgia, 408 U.S. 283 (1972); and Eddings v. Oklahoma, ___ U.S. ___ (1982), require an adequate procedure to determine the merits of a claim that a capital conviction is based on false evidence. Under Hallman v. State, supra,

that procedure was declared to be by writ of error coram nobis.

Petitioner respectfully submits that he has met all of the criteria of Hallman v. State, supra, for leave to file a petition for writ of error coram nobis. Accordingly, Petitioner requests that this Court grant him leave to file his petition for such a writ in the Circuit Court.

Respectfully submitted,

Edward S. Stafman

Attorney at Law
224 West 4th Avenue
Tallahassee, Florida 32303
(904) 222-5029
(904) 488-8641

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by pre-paid United States Mail, to Jim Smith, Esq., Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, this 23rd day of June, 1982.

Edward S. Stafman

VERIFICATION

I, Anthony Ray Peek, hereby verify that I have read the foregoing Request for Leave to File Petition for Writ of Error Coram Nobis, and that the facts as stated therein are true and correct to the best of my knowledge and belief.

Anthony Ray Peek

Sworn to and subscribed
before me this 21 day
of June, 1982.

Notary Public

My commission expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires, [illegible]

DEPARTMENT OF CRIMINAL LAW ENFORCEMENT

PERFORMANCE EVALUATION REPORT

ARE YOU USING TYPEWRITER FOR FINAL MARKINGS

(X) Annual
( ) Probationary
( ) Special

EMPLOYEE NAME (Last) (First) (Init.)	EMPLOYEE NO.	DIVISION	FIELD OFFICE OR BUREAU
BASS, Dana L.	00720	Div. of Staff Services	Crime Laboratory
CLASS TITLE	EMPLOYEE STATUS	SECTION	DUE DATE:
SECTION A CLA ii	Permanent	Sanford Laboratory	July 18, 1978

1 Unsatisfactory	2 Conditional	3 Satisfactory	4 Above Satisfactory	5 Outstanding	FACTOR CHECK LIST Immediate Supervisor Must Check Each Factor in the Appropriate Column	BOARD REVIEW ONLY
	X				1. Observance of Work Hours	
		X			2. Attendance	
		X			3. Grooming & Dress	
		X			4. Compliance with Rules	
		X			5. Safety Practices	
		X			6. Public Contacts	
					7. Support Contacts	X
X					8. Employee Contacts	
		X			9. Knowledge of Work	
		X			10. Work Adequate	
	X				11. Planning and Organizing	
	X				12. Job Skill Level	
	X				13. Quality of Work	
	X				14. Volume of Acceptable Work	
		X			15. Meeting Deadlines	
		X			16. Accepts Responsibility	
		X			17. Accepts Direction	
		X			18. Accepts Change	
		X			19. Effectiveness Under Stress	
		X			20. Appearance of Work Station	
	X				21. Operation & Care of Equip.	
	X				22. Work Coordination	
		X			23. Initiative	
					24. (ADDITIONAL FACTORS)	
X					25. Evidence Handling	
X					26. Written Communications	
					27.	
					28.	
X					OVERALL RATING	
					FOR EMPLOYEES who SUPERVISE OTHERS	
					30. Planning & Organizing	
					31. Scheduling & Coordinating	
					32. Training & Instructing	
					33. Effectiveness	
					34. Evaluating Subordinates	
					35. Judgments & Decisions	
					36. Leadership	
					37. Operational Economy	
					38. Supervisory Control	
					39 (ADDITIONAL FACTORS)	
					40	
					41	

CHECKS IN COLS. 1 AND 2 MUST BE EXPLAINED IN SECTION B

SECTION B | Record job STRENGTHS, superior performance incidents, progress achieved, or checks in Col. 4 and 5. Ms. Bass expresses the desire to work independently with little direct supervision. She has also attempted the responsibility of accepting the majority of the large and complicated microanalysis cases. These efforts are commendable in that they reflect her desire for professional growth.

SECTION C | Record specific GOALS or IMPROVEMENT PROGRAMS to be undertaken during next evaluation period. Due to the overall "conditional" rating of this evaluation and the noted deficiencies in technical skills and evidence handling procedures, Ms. Bass will be conducting all work for the next six month period under the direct supervision of the Microanalysis Section Supervisor.

SECTION D | Describe SATISFACTORY performance. (Optional for most factors checked in Col. 3; MANDATORY for some factors—see instructions.) Although some deficiencies in the areas of court and laboratory attire and acceptance of change and suggestions were noted earlier in this rating period, recent improvement has raised these factors to a satisfactory rating.

SECTION E | Record specific work performance DEFICIENCIES or job behavior requiring improvement or correction. (Explain checks in Col. 1 and 2.)

--- SEE ATTACHED PAGES ---

RATER: I certify this report represents my best judgment. ☐ I DO; ☐ I DO NOT recommend this employee be granted permanent status. (For final probationary reports only).

(RATER'S SIGNATURE) (TITLE) (DATE)

REVIEWER: (REVIEWER'S SIGNATURE) (TITLE) (DATE) 7-13-78

EMPLOYEE: I certify that this report has been discussed with me. I understand my signature does not necessarily indicate agreement. ☐ I wish to discuss this report with the reviewer.

Comment:

(EMPLOYEE'S SIGNATURE) (DATE) 7-21-78

APPENDIX "A"

SECTION E

#1 OBSERVANCE OF WORK HOURS

It has been noted that Ms. Bass consistently fails to observe the official working hours. Ms. Bass normally reports for work at 8:30A.M. and leaves promptly at 5:00P.M., while observing a normal lunch hour, thereby working a shortened workday. This deficiency has had a detrimental influence on other staff members who question why they should work a full day when Ms. Bass does not.

#8 EMPLOYEE CONTACTS

Ms. Bass apparently does not recognize the importance of her interpersonal contacts with other staff members. Numerous complaints have been received in regards to her callous attitude with other supervisors, staff members, and evidence technicians. These interpersonal problems have had a particularly detrimental influence in multisectional cases where Ms. Bass fails to consider that other analysts must examine evidentiary items that she has examined. She frequently fails to consult the other analysts involved in the case in order to properly coordinate the priority of the required examinations.

A second area of concern is her social interactions during the workday. Although Ms. Bass is a personable individual who has the capability of satisfactorily interacting with people, she frequently becomes withdrawn and makes little contact with other staff members. On other occasions, Ms. Bass will enter conversations already in progress between staff members and then dominate them. Each of these two situations tend to alienate Ms. Bass from the other staff members.

#11 PLANNING AND ORGANIZING

Ms. Bass apparently has difficulty in planning and organizing her activities both during a day and during longer term activities. This problem manifests itself most commonly in relation to the timely analysis and reporting of multiple cases that may be assigned to her. The inability to properly organize and plan her time causes difficulty in the respect that

SECTION E

#11 PLANNING AND ORGANIZING (con't)

she starts more tasks or cases than can be completed in a reasonable period of time. This results in many partially completed tasks or cases that occasionally remain uncompleted for some time.

#12 JOB SKILL LEVEL

Although Ms. Bass has approximately three years experience in the crime laboratory, her technical skills in the analysis of evidentiary materials is not commensurate with this time period. Although her skills in basic microscopy appear adequate for a first or second year microanalyst, she does not utilize the more advanced techniques that should have been aquired in three years. The fact that she uses a number of antiquated criteria for the analysis of hair, such as scale counting, should be indicative of a lack of adequate background training in this area. Her general scheme for hair comparisons appears to be lacking in the detailed morphological description required for this type of examination. The failure to utilize the comparison microscope in this type of examination is to be considered a serious fault.

Ms. Bass has not demonstrated the knowledge of instrumental methods of analysis usually observed in third year microanalysts. A lack of knowledge and experience has been observed in her use of IR, PGC, AA, and other instrumental methods. The inability to choose appropriate methods of instrumental analysis and the lack of knowledge needed to competently perform these analyses should be considered an extremely serious deficiency.

The value of record-keeping or note-taking concerning forensic samples is of unquestionable value. In view of the fact that months or years may separate the analysis of an evidentiary item and the testimony resulting from that analysis, it is self-evident that the facts involved should not be trust to memory. Ms. Bass consistently fails to take notes concerning her cases. The failure to take notes concerning her observations, recorder charts, instrumental parameters and other facts of the analysis should be

SECTION E

#12 JOB SKILL LEVEL (con't)

considered a grave deficiency. This problem has caused numerous occurences where her failure to adequately document the transference of evidentiary items from one section to another could have jeopardized the integrity of the chain of custody resulting in the court inadmissability of the item.

#13 QUALITY OF WORK

The analyses conducted by Ms. Bass are generally of conditional quality. Although she conducts the basic analysis adequately, she fails to extract all the information available from a sample, thereby loosing some of the potential value of an evidentiary item. The most apparent reason for this phenomenon is her apparent lack of experience in instrumental analysis.

#14 VOLUME OF ACCEPTABLE WORK

Ms. Bass has difficulties in planning and organizing her workday in addition to starting more tasks than she can complete in a reasonable time. Both of these factors have adversely affected her productivity.

#21 CARE AND OPERATION OF EQUIPMENT

A general disregard for the expensive analytical and microscopic equipment utilized in the microanalysis section has been noted. On numerous occasions Ms. Bass has failed to maintain the liquid nitrogen level in the SEM Detector. Preventive maintenance procedures, such as covering the microscope when finished or removing the pyroprobe from the GC, are generally not considered.

#25 EVIDENCE HANDLING PROCEDURES

Evidence handling is one of Ms. Bass's most problematical areas. She does not appear to have a proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory table top overnight. This failure to protect the items by repackaging them

SECTION E

#25 EVIDENCE HANDLING PROCEDURES (con't)

when not actually involved in an analysis leaves the very strong probability of extraneous contamination, cross-contamination among items, and possible loss of trace evidence.

Ms. Bass fails to realize that the integrity of the evidence must be maintained even after the laboratory examination is complete. In a recent case Ms. Bass conducted a paint comparison between an automobile fender and a bumper. At the conclusion of her laboratory examination, Ms. Bass stored these items of evidence outside in back of the laboratory in an unpackaged condition and in an unprotected area thereby subjecting them to the frequent rains occurring at that time of year. These items quickly became dirty and rusty before she was directed to protect them by the microanalysis section supervisor.

#26 WRITTEN COMMUNICATIONS

Although Ms. Bass is an intelligent and well-educated individual who is capable of expressing her ideas clearly, she has difficulty in written communications due to her extremely poor penmanship. This factor, coupled with her insistance on using a red pen, cause the secretarial staff extreme difficulty in typing her written reports. On numerous occasions Ms. Bass has received the suggestion to print her reports and not to use a red pen, however, she has not been receptive to the suggestions.

AFFADAVIT

Before me, the below named authority, personally appeared DIANA BASS, who, beig duly deposed states as follows:

1. My name is Diana Bass. From 1974-1978, I was employed at the Sanford Crime Lab in Sanford, Florda, for the Florida Department of Criminal Law Enforcement as a microanalyst.

2. During the course of my employment, I had occasion to testify in the case of State v. Peek as an expert on hair analysis. I testified, among other things, that "it has been determined that there is probably no more than two people out of every ten thousand persons who will exhibit exactly the same characteristics in their hair as they are examined microscopically." I was then asked by the prosecutor:"So, the odds then are one or two out of 10,000?" I testified: "Yes."

3. In giving this testimony, I was relying primarily upon an article entiled An Attempt at Determining Probabilities in Human Scalp Hair Comparison, by B.D. Gaudette & E.S. Keeping, accepted for publication on December 20, 1973.

FURTHER THE AFFIANT SAYETH NOT.

I certify that I have read the foregoing and that it is true and correct to the best of my knowledge and belief.

Diana Bass

Sworn and subscribed before me this 2 day of JUNE, 1982.

Notary Public

[redacted]

APPENDIX "B"

P. D. Barnett,[1] B.S. and R. R. Ogle,[2] A.B.

Probabilities and Human Hair Comparison

REFERENCE: Barnett, P. D. and Ogle, R. R., "Probabilities and Human Hair Comparison," *Journal of Forensic Sciences*, JFSCA, Vol. 27, No. 2, April 1982, pp. 272-278.

ABSTRACT: Critical review shows that probability estimates regarding human scalp and pubic hair individualization are in error owing to defects in experimental design. The inherent bias is evaluated to preclude improper use of these probability estimates in the future.

KEYWORDS: criminalistics, hair, probability, human identification

Beginning in 1974, Gaudette and Keeping [1] and Gaudette [2,3] published a series of papers concerning the probabilities of human hair comparison. Their conclusions are cited by expert witnesses when asked about the certainty of a hair comparison [4-6]. Nonetheless, in the seven years that have elapsed since the publication of the first of these articles, there has been no attempt reported in the literature to confirm Gaudette's work or criticize his treatment of his data. This is particularly disturbing since valid probability statements regarding hair evidence would be a significant step in the analysis of a commonly occurring type of physical evidence. The methods of data collection and data manipulation used by Gaudette need careful scrutiny to determine the validity of the conclusions.

Introduction

Most of the evidence examined by criminalists falls into the category of associative evidence, that is, evidence that tends to associate one person, place, or thing with another person, place, or thing. Fired bullets, fingerprints, bloodstains, paint and fiber transfers, handwriting, and many other types of physical evidence fall into this category. In the process of individualization, the criminalist attempts to link the evidence with standards from another place (or person or thing). If the evidence and standard share common attributes suggesting they have a common source, they are said to match. Once the evidence and standard are determined to be a match, a decision must be made as to the significance of this finding.

The significance of the match between two objects requires knowledge about the frequency of occurrence of the measured attributes in the population. If the set of measured attributes occurs only in a single individual in the population, then the match results in individualization (the conclusion that the evidence could have originated only from the same source as the standard). On the other hand, if the set of measured attributes occurs in a large portion of the population, the fact that the evidence and standard match is of little significance.

A primary task facing criminalists in the evaluation of associative evidence is the determination of those attributes of the physical evidence useful in the task of individualization. In order to be useful the attributes must be capable of measurement and not shared by the entire population. If these attributes can be identified (that is, described and measured), and if the frequency of occurrence of the attributes in the population can be determined, then, in principle, probability estimates can be made to assist in evaluating the significance of the evidence. These probability estimates are used to determine the degree of certainty that the evidence originated from the same source as the standard.

To be useful, probability estimates should have several features. First, the estimated probability must be logically related to a relevant question about the evidence. Second, the estimated probability should be based on characteristics that have been, or are capable of being, measured. Third, the experiments performed to evaluate the probability estimates must be logically related to the probability statements.

The series of papers by Gaudette and Keeping [1] and Gaudette [2,3] describe experiments claimed to provide first estimates of certain probabilities useful for the individualization of human scalp and pubic hair. Unfortunately, the probability estimates are grossly in error because of experimental bias and improper statistical treatment of the data. The uncritical use of the probability estimates as a basis for opinions regarding the individualization potential of hair evidence can be misleading.

The bias in Gaudette and Keeping's data stems from their confusion of two distinctly different tasks: the task of discriminating between two (randomly selected) hairs and the task of correctly assigning an unknown hair to its true source. The distinction between these two different tasks is crucial to formulating any probability statement regarding the origin of a hair. The task facing the hair examiner is to determine simultaneously the degree of similarity and the degree of dissimilarity between the questioned and standard hairs. When a criminalist indicates that a match exists between two hairs, he means that the observable similarities between the two hairs outweigh significantly the observable dissimilarities between the two. The experimental design used by Gaudette and Keeping dealt solely with the ability to distinguish two hairs and failed to include any consideration of factors that allow hairs from the same individual to be individualized. Since there are always observable differences between any two hairs (even from the same individual), the experimental method Gaudette and Keeping should have resulted in a high rate of success in distinguishing between any two hairs. The inherent bias, therefore, in the experiment was toward a low probability estimate—not of incorrectly identifying an individual but of failing to distinguish two hairs. It should not, therefore, be surprising that their probability estimates were low.

A critical bias in their experimental design derived from the use of a set of dissimilar hairs from each individual in the study. The process of individualization involves both matching the hair to its correct source and eliminating any other source for the hair. The use of dissimilar hairs from each individual placed the examiner in the position of knowing in advance that any match between two hairs was erroneous. Determinations with the comparison microscope (both in longitudinal and in cross-sectional aspects) required a subjective judgment as to whether the given pair of hairs matched. Even after microscopic comparison of those whole mounted hairs not distinguished by the initial coding, 19% of the total sample (163 of 861 hairs) could not be distinguished from other hairs in the sample. In each of these side-by-side comparisons, the examiner knew that any match found would be erroneous and obvious bias resulted.

Another bias present in the experimental design stemmed from their use of nonindividualizing features in the comparison of hairs. The characteristics of the root, for example, are diagnostic of the growth cycle of the hair and the manner in which it was removed from the scalp. Hair length and tip appearance are related to scalp location as well as to in-

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[1]Criminalist, Forensic Science Associates, Emeryville, CA.
[2]Criminalist, Institute of Criminalistics, Vallejo, CA.

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APPENDIX "C"

dividual source. The use of nonindividual characteristics, the use of characteristics that have not been shown to be related to differences between individuals (for example, medullary index and medulla type), and the use of multiple measures of the same characteristic (for example, longitudinal and cross-sectional pigment density and size) created a bias for false answers. It certainly tended to lower the probability estimate.

Using data that, by the design of the experiment, were bound to demonstrate a high rate of success in *discriminating hairs*, Gaudette and Keeping then proceeded to apply these data, and the probabilities derived from them, to the task of individualizing hair. Gaudette [1,2] said the probabilities of a matching hair having originated from someone else could be determined from his data. But probability estimates must be made from data inherently capable of testing the hypothesis under consideration. To determine if the data gathered by Gaudette and Keeping can be used to evaluate the significance of a hair match, several probability statements that can be made about hair comparisons should be examined.

Data Manipulation

To be useful, a probability statement should have one or more of the following attributes:

1. It should be capable of being answered.
2. It must be relevant to the task at hand.
3. Data should be available, or obtainable, to determine the probability.

With these restrictions in mind several probability statements can be posed regarding hair evidence:

I. What is the probability that a hair from a given individual will match another hair from the same individual, if the hair is compared to hair standards from a large number of individuals, including the correct individual?

II. What is the probability that a person will have a hair that cannot be distinguished from one hair from another individual?

III. Given samples of representative (that is, representative of the various hair types from each individual) hairs from a number of individuals, what is the probability that any randomly selected pair of individuals will have a matching pair of hairs?

IV. Given samples of different but representative hairs from each of a large number of individuals, what is the probability that a randomly selected pair of hairs will be found to match?

Gaudette and Keeping [1] posed probability statement II, but their derivation of probability was instead based on probability statement IV. This fact, coupled with the bias of the experiment, generated a probability estimate that was virtually meaningless with respect to hair individualization.

Each of these probability statements are discussed below and evaluated based on the data given by Gaudette and Keeping [1]. A summary of the data from Gaudette's first two articles [1,2] is given in Table 1.

Probability Statement I

What is the probability that a hair from a given individual will match another hair from the same individual, if the hair is compared to hair standards from a large number of individuals, including the correct individual?

This question is essentially a management question dealing with the value of hair examinations in general. If the probability is very low, then the ritual of hair examination would not be justified in routine casework in the laboratory because of a low payoff. If the probability is

TABLE 1—*Data from hair comparisons taken from Gaudette and Keeping [1] and Gaudette [2].*

Hair Type	Individuals, n	Hairs, n	Hair Comparisons, n	Matching Pairs, n
Scalp	100	861	370 230	9 (13 individuals)
Pubic	60	454	101 304	16 (25 individuals)

reasonably high, then the routine examination of hair in the criminalistic laboratory may be justified. The experimental design of Gaudette and Keeping precludes estimating this probability.

Probability Statement II

What is the probability that a person will have a hair that cannot be distinguished from one hair from another individual?

This is clearly a relevant question, since its evaluation requires consideration of the criteria necessary for determination of a match or nonmatch in comparing two hairs. In Gaudette's studies, in which all of the hair matches were known to involve different individuals, 13% of the individuals had a scalp hair and 42% of the individuals had a pubic hair which was not unique. These figures are promising as they seem to indicate that most people have unique hair. The figures, however, are seriously flawed, since every match between hairs was known to be a nonmatch between individuals.

Probability Statement III

Given samples of representative hairs from a number of individuals, what is the probability that a randomly selected pair of individuals will have a matching pair of hairs?

This probability statement is very similar to II above, but the distinction is a crucial one. Statement II relates to all individuals involved in the study, whereas statement III relates to a randomly selected pair of the individuals involved in the study. The probability estimates P for this statement can be derived as follows, using Gaudette's data. For scalp hair, where n is the number of individuals in the study (100) and C is the number of pairwise individual comparisons.

$$C = \frac{n!}{2!(n-2)!}$$

$$= \frac{100!}{2!(100-2)!}$$

$$= \frac{(100)(99)}{2} = 4950$$

The probability is therefore

$$P = \frac{9}{4950} = 0.002$$

For pubic hair,

$$C = \frac{(60)(59)}{2} = 1770$$

and the probability is

$$P = \frac{16}{1770} = 0.009$$

Probability statement II cautions that there is a reasonable chance (13% if head hair, 42% if pubic hair) that the suspect may not have hair which is unique in the population. Probability statement III indicates that there is only a small chance, less than 1% even for pubic hairs, that any two randomly selected individuals will have a matching pair of hairs.

Even though the probability estimates for statement III seem low—indicating that hair is a useful type of evidence—the estimates are still much larger than those figures used by Gaudette. For comparison, these values are shown in Table 2. The differences between Gaudette's values and those derived above is one order of magnitude, and it must be noted that this derivation is based on data that are inherently biased owing to the experimental design.

Although probability statement III is relevant to the task faced by hair examiners, the probability given above is not relevant to the evaluation of an actual case. The actual situation can be better stated by a slightly, but very importantly, modified version of probability statement III.

Given a match between a questioned hair and hair from a given individual, what is the probability that the questioned hair will match a hair of a randomly selected second individual?

This is a statement of the problem facing the criminalist with all types of associative evidence. It is a statement of conditional probability. The evaluation of this statement of conditional probability required estimation of the probability of one event, denoted A, occurring given the occurrence of another event, denoted B. This can be expressed as

$$P(A|B) = \frac{P(AB)}{P(B)}$$

where, in this instance,

A = a single hair will be found to be similar to a sample of hair from a different individual.
B = a single hair will be found to be similar to a sample of hair from the same individual.
$P(B)$ = probability of B occurring.
$P(AB)$ = probability of both A and B occurring, and
$P(A|B)$ = probability that A will occur if B has already occurred.

TABLE 2—Probability that hair from two individuals will match.

Hair Type	Gaudette	Probability Statement III
Head	1/4500 = 0.00022	1/500 = 0.002
Pubic	1/800 = 0.00125	16/1770 = 0.009

Thus, if $P(AB)$ and $P(B)$ can be determined, the probability estimate of the hypothesis can be evaluated. The evaluation of this probability, however, is not possible from Gaudette's data. It is axiomatic that no two hairs are truly identical. The problem facing criminalists is not the ability to distinguish between two hairs but the ability to determine when two hairs should not be distinguished (that is, they match). Criminalists are concerned with identifying and distinguishing people, not hair. The value of hair as evidence must be determined by its usefulness in identifying people, and the data presented by Gaudette and Keeping are of little use for that purpose.

Probability Statement IV

Given samples of representative hairs from each of a large number of individuals, what is the probability that a randomly selected pair of hairs will be found to match?

This probability estimate, although of theoretical interest, is not of particular significance to the process of hair individualization. It is, however, the probability estimate derived by Gaudette and Keeping [1] for scalp hair and by Gaudette [2] for pubic hair. The uncritical use of these probability estimates can easily distort the value of hair evidence, particularly when presented to a lay jury hearing evidence that involves hair identification and could lead to a miscarriage of justice when hair evidence plays a prominent role in a case.

Discussion

The hair studies described by Gaudette and Keeping [1] and Gaudette [2,3] represent an attempt to provide an objective basis for opinions regarding the confidence level of hair individualization. Unfortunately, the bias in the experimental design and the failure to relate probabilities to the questions posed generated probability estimates that were irrelevant to hair individualization. Furthermore, the errors in the derivation introduced a problem in the administration of justice greater than that which the experiments attempted to solve. We have personally witnessed the giving of testimony to the effect that the matching of the evidential hair to hair from an individual signifies a high probability of individualization and that when more than one hair matches an individual the probability of individualization "skyrockets." Moreover, other criminalists have indicated that the probability estimates given by Gaudette and Keeping are used indiscriminately in many jurisdictions. Testimony is routinely given stating that, in effect, while the witness does not personally know the probabilities involved in hair comparison and while the witness cannot vouch for the validity of the data of Gaudette and Keeping, the probabilities of false identification derived by Gaudette and Keeping are 1/4500 for scalp hair and 1/800 for pubic hair.

In his 1978 paper Gaudette [3] cautions, "The significance of this research is not in the actual probability numbers found but in the experimental proof of the proposition that macroscopic and microscopic hair comparison is a useful technique and that hair evidence is good evidence." While it is good to recognize that the numbers themselves were not the important feature of the work, the magnitude of the values obtained were used by Gaudette to justify the use of hair as a means of personal identification. As has been pointed out above, these numbers and the experiments by which they are derived are seriously flawed. They do not justify the statement that "hair evidence is good evidence."

The probability estimates derived by Gaudette and Keeping [1] and Gaudette [2] are not relevant to hair individualization. The probabilities they derived refer to the process of distinguishing between two hairs that the examiner knows originated from two people—a task not at all related to the normal laboratory operation. The normal laboratory task involves comparison of a single unknown hair with hair from one or more individuals. This is done by an exhaustive search, involving pairwise comparisons of the unknown with all of the standard hairs until a match is obtained, or until no pairs remain to compare. This re-

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hairwise comparison will, obviously, result in a higher probability of a false identification than the single, random comparison to which their data apply.

The critical information lacking from their data, and which makes their data useless for estimating the probability of a false identification, is how well the technique works for identifying the correct individual. Two anecdotes in the final article of the series [3] appear to indicate that it is possible to correctly identify a single hair in some instances. This falls far short, however, of validating the probability estimates previously derived by Gaudette and Keeping.

Gaudette and Keeping [1] and Gaudette [3] point out that different examiners get different results with the technique. This means that, even if the data are correct and usable, the numbers must be determined anew by each person who uses them. It is not clear, however, that the coding technique used in the first two articles was used in the experiments described in the third article. In fact, in the second experiment described in the third article, the hairs were compared directly—presumably this method was also used in the first set of experiments in the third article. Such an experiment cannot be used to validate the probability figures previously derived; yet, Gaudette [3] insisted

> The important point is that these experiments do not contradict [emphasis added] the previous results. . .(that) if one unknown hair is found to be similar to a representative standard. . .for an average case. . .the probabilities of that one hair having originated from someone else would be about 1 in 4500 for scalp hair and 1 in 800 for pubic hair.

The verification experiments neither verify nor contradict the probability estimates of Gaudette and Keeping. They merely indicate that the source of a given hair can, in some cases at least, be identified within a limited population.

The objective status of the individualization potential of hair evidence, unfortunately, has neither been improved nor defined by the studies of Gaudette and Keeping [1-3]. At the present time, the status of hair individualization can be stated as follows: When a match occurs between an evidence hair and standard hairs from an individual, the evidence hair could have come from that individual.

Editor's note: D. Gaudette's response appears on p. 279 of this issue.

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[3] Gaudette, B. D., "Some Further Thoughts on Probabilities and Human Hair Comparison," *Journal of Forensic Sciences*, Vol. 23, No. 4, Oct. 1978, pp. 758-763.
[4] *People v. McGowan*, 398 N.E.2d 1201 (Illinois App. Ct. 1979).
[5] *State v. Carlson*, 267 N.W.2d 170 (Minn. 1978).
[6] *U.S. v. Massey*, 594 F.2d 676 (8th Cir. 1979).

Address requests for reprints or additional information to
Peter D. Barnett
Forensic Science Associates
1250 33rd St.
P.O. Box 9181
Emeryville, CA 94608

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT, IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,	:	
	:	
vs.	:	
	:	
ANTHONY RAY PEEK,	:	Case No. CF78-445
Defendant.	:	
	:	
	:	

PETITION FOR WRIT OF ERROR CORAM NOBIS

Petitioner, Anthony Ray Peek, petitions this court for a writ of error coram nobis. This request is based upon the following grounds.

Introduction

1. Petitioner, Anthony Ray Peek, was convicted in this court on April 13, 1978, of first degree murder, sexual battery, grand larceny, and burglary. On May 2, 1978, he was adjudged guilty and sentenced to death, a consecutive life sentence, and two consecutive five year sentences for the respective offenses.

2. On October 2, 1980, the Florida Supreme Court, by a 5-2 margin,[1] affirmed the judgment and sentence of this court. Peek v. State, 395 So. 2d 492 (Fla. 1980).

3. The State presented three pieces of evidence incriminating Petitioner at trial:

a. Blood and seminal fluid stains taken from the

[1]The tally of Supreme Court Justices was 4-2, with Associate Justice Vann joining the majority, and Justices Sundberg and England dissenting. The dissenting justices maintained, inter alia, that there was insufficient evidence to support the conviction.

victim's pajamas indicated the presence of type "O" secretor blood. According to the trial testimony, 33% of the population has type "O" secretor blood, including Petitioner.[2]

b. The victim's car was found the day after the crime approximately one mile from her residence at a park, and near her place of employment. Numerous fingerprints were found inside the car, including one that matched Petitioner's. Petitioner testified that, the morning after the crime, he saw the unlocked car while eating breakfast in the park at which the car was found, and he decided to "look around", probably with burglary in mind. However, he testified that there was nothing worth taking, and he left. This fingerprint explains how Petitioner became a suspect in the crime. It was the only positive evidence linking Petitioner to anything having to do with the crime, although it does not link him to the crime itself.

c. A piece of stocking containing a single fragment of a strand of negroid hair was found on the floor in the garage of the victim's home (although the victim's body was found in the bedroom). An employee from the Florida Department of Law Enforcement testified that hair samples obtained from Petitioner were microscopically consistent in appearance to the fragment found in the stocking. She further testified, as noted by this Court in its opinion, that "various studies by many persons now working in my field have determined that there is probably no more than two people out of every ten thousand (10,000) persons who will exhibit exactly the same characteristics in their hairs" (R-453). We now know that the hairs examined were probably mixed up, the comparison was incorrectly done, and the statistics relied upon are "grossly in error".

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[2] We now know that 54% of the population could have left the stains. Because the victim was also blood type "O", the presence of the "O" factor could have come from her, and the person who left the stains could have been any blood type, non-secretor status. In total, 54% of the population could have left the stains. Nevertheless, this fact could and should have been discovered at the time of trial and thus, concededly, does not constitute a valid ground for the issuance of a writ of error coram nobis. Hallman v. State, 371 So. 2d 482 (Fla. 1979).

Count I--The Employee Evaluation

4. The hose containing the hair fragment was received by the crime lab in June, 1977 (R-504-505). On July 7, 1977, Petitioner's hair sample was delivered to the lab along with samples from other persons. In December, 1977, some six months later, a hair sample which was purported to have come from Petitioner was received by the analyst (R-505-506). Nobody could testify where that hair sample was for those six months. Furthermore, the analyst did not say where or how the fragment was stored from the time it was discovered in June, 1977, until it was compared to the hair of Petitioner in December, 1977. This Court held that these failures in the chain of custody did not require reversal because there was no indication of "probable tampering". Newly discovered evidence reveals probable tampering. This same newly discovered evidence also reveals that the hair comparison was performed incorrectly and was based upon antiquated techniques.

5. This newly discovered evidence consists of an employee evaluation given the analyst about 2-3 months after trial (attached as Appendix "A"). It raises serious allegations of probable, though unintentional, tampering. Upon rating the analyst as "unsatisfactory" in evidence handling, the evaluation states:

> Evidence Handling
>
> Evidence handling is one of Ms. Bass' most problematical areas. She does not appear to have the proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory table top overnight. This failure to protect the items by repackaging them when not actually involved in an analysis leaves a VERY STRONG PROBABILITY OF EXTRANEOUS CONTAMINATION, CROSS-CONTAMINATION AMONG ITEMS, and possible loss of trace evidence.[3]
>
> Ms. Bass fails to realize that the intergrity of the evidence must be maintained even after the

[3]This "very strong probability of extraneous contamination [or] cross-contamination" is even stronger when the subject of the analysis is hair because of the highly mobile nature of hair and the serious danger of mix-up therefrom. It is entirely possible that the analyst compared one of Petitioner's hairs to another of his hairs or that one of the items compared came (continued)

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> laboratory examination is complete. In a recent case, Ms. Bass conducted a paint comparison between an automobile fender and a bumper. At the conclusion of her laboratory examination, Ms. Bass stored these items of evidence outside in back of the laboratory in an unpackaged condition, and in an unprotected area, thereby subjecting them to the frequent rains occuring at that time of year. These items quickly became dirty and rusty before she was directed to protect them by the microanalysis section supervisor.

(Emphasis supplied.)

6. This raises the "very strong probability of" tampering, albeit unintentional. The evaluation also raises questions of equal seriousness regarding the analyst's abilities to perform a hair comparison:

> Job Skill Level
>
> Although Ms. Bass has approximately three years experience in the crime laboratory, her technical skills in the analysis of evidentiary materials is not commensurate with this time period. Although her skills in basic microscopy appear adequate for a first or second year microanalyst, she does not utilize the more advanced techniques that should have been acquired in three years. The fact that she uses a number of antiquated criteria for the analysis of hair, such as scale counting,[4] should be indicative of a lack of adequate background training in this area. Her general scheme for hair comparisons appears to be lacking in the detailed morphological description required for this type of examination. The failure to utilize the comparison microscope in this type of examination is considered to be a serious fault.
>
> Ms. Bass has not demonstrated the knowledge of instrumental methods of analysis usually observed in third-year microanalysts. A lack of knowledge and experience has been observed in her use of IR, PGC, AA, and other instrumental methods. The inability to choose appropriate methods of instrumental analysis and the lack of knowledge needed to competently perform these analyses should be considered an extremely serious deficiency.

(Emphasis supplied.)

7. The analyst lost the hair immediately subsequent to testing and so there is no opportunity now to go back and demonstrate conclusively that it was not consistent with Petitioner's. However, the evaluation shows that the analyst's continuous failure to properly care for the evidence, in the words of the Florida

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from another suspect, a lab employee, one of the black police officers at the scene, or one of the thousands of persons who could have left a hair on the floor of the victim's garage, such as service persons.

[4] This was the method utilized in this case.

Department of Law Enforcement supervisory personnel, "leaves a very strong probability of extraneous contamination, cross-contamination among items, and possible loss of trace evidence." Thus, Petitioner can now show, through this evaluation, probable tampering, albeit unintentional, with the evidence. Also, Petitioner can show that the analyst did not have the abilities to accurately perform an analysis. In a study published months after the trial, it was found that one of three inexperienced hair analysts misidentified common hair types.[5]

Count II--The Statistics

8. At the time of the trial, there was only one experiment in the field which purported to establish statistical probabilities for matching hair. This experiment arrived at a statistical probability of 1 in 4500 that two hairs will match. Based upon this experiment,[6] the analyst testified that "various studies by many persons[7] in my field have determined that there are probabily no more than two people out of every 10,000 persons who will exhibit exactly the same characteristics in their hairs." Some months subsequent to trial, the author of this experiment significantly qualified it in a further work, and conceded that the statistics would not apply to a case such as this. Then, in April, 1982, the latest and only other article on the subject (attached as Appendix "C") concluded that the first experiment was totally incorrect:

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[5]Petitioner can also show that the witness was seriously mistaken in her testimony that the fragment was consistent with Petitioner's hair in 30-35 characteristics. Only 20-25 such characteristics exist. Nevertheless, this knowledge was available at the time of trial, and, admittedly, is not a propert subject for a writ of error coram nobis. Hall v. State, supra.

Similarly, it was never pointed out at trial that the fact that the hose upon which the hair was found was found on the floor, a place where numerous hairs may be picked up. However, this, too, was a proper matter for trial, not for writ of error coram nobis.

[6]See affidavit (Appendix "B"). The affidavit states that the witness' testimony was based "primarily" upon this experiment. However, Petitioner is prepared to prove that no other experiment or study existed.

[7]This simply was not true, but, again, it was the duty of the public defender to cross-examine on it. He did not.

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> In the seven years that have elapsed since the publication of the first article, there has been no attempt reported in the literature to confirm Gaudette's work or criticize his treatment of the data . . . . [The experiment] claims to provide first estimates of certain probabilities useful for the individualization of human scalp and pubic hair. Unfortunately, the probability estimates are GROSSLY IN ERROR because of experimental bias and improper statistical treatment of the data . . . . The probability estimates derived by Gaudette are not relevant to hair individualization.

(Emphasis supplied.) Thus, the testimony of the hair witness concerning probabilities has been completely discredited in the field and is not relied upon by hair experts.[8]

Coram Nobis Allegations

9. The various facts alleged in Counts I and II above can be proved through the use of the employee evaluation, and the recently published articles. These facts were not known, nor could they have been known at the time of trial, because the employee evaluation was created some months after the trial, the article qualifying the original experiment was published some months after the trial, and the latest article completely discrediting the first experiment was published in April, 1982.

10. The facts cited above are of such a vital nature that, had they been known by the trial court, they conclusively would have prevented the entry of judgment against Petitioner. Without the hair evidence and the statistical probabilities, the only evidence linking Petitioner to this crime is a fingerprint on a car found a mile away from the scene which Petitioner acknowledges he placed on the car the next morning while attempting to burglarize it, and about which there is no proof to the contrary, and blood and semen stains which could have been left by at least 33%, if not 54%, of the population.

11. Even if the facts cited above would not have conclusively

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[8] Of course, the lone experiment was not "various studies by many persons in my field," as the analyst testified. Nevertheless, this, too, should have been pointed out on cross-examination and is not a proper subject for error coram nobis.

prevented the entry of judgment against Petitioner, those facts would have been significant factors in determining Petitioner's guilt and the appropriateness of the death penalty in this case.

WHEREFORE, based upon the foregoing, Petitioner respectfully requests this Court grant his petition for a writ of error coram nobis.

Respectfully submitted,

Edward S. Stafman

Attorney at Law
244 West 4th Avenue
Tallahassee, Florida 32303
(904) 222-5029
(904) 488-8641

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished, by pre-paid United States Mail, to Jim Smith, Esq., Attorney General, Office of the Attorney General, The Capitol, Tallahassee, Florida 32301, this ____ day of June, 1982.

Edward S. Stafman

VERIFICATION

I, Anthony Ray Peck, hereby verify that I have read the foregoing Petition for Writ of Error Coram Nobis, and that the facts as stated therein are true and correct to the best of my knowledge and belief.

Anthony Ray Peck

Sworn to and subscribed before me this 21 day of June, 1982.

Notary Public

My commission expires:

NOTARY PUBLIC, State of FLORIDA
My Commission Expires Dec. 3, 1985

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Supreme Court of Florida

THURSDAY, SEPTEMBER 9, 1982

ANTHONY RAY PEEK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 62,234

Upon consideration of the Petition for Writ of Error Coram Nobis, it is ordered by the Court that said petition be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and McDONALD, JJ., concur
SUNDBERG and EHRLICH, JJ., dissent

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Deputy Clerk

TC
cc: Edward S. Stafman, Esquire
Charles Corces, Jr., Esqui

IN THE SUPREME COURT OF FLORIDA

ANTHONY RAY PEEK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 62,234

PETITION FOR REHEARING AND/OR CLARIFICATION

Petitioner petitions this Honorable Court for rehearing and/or clarification of its order of September 9, 1982, and would show the Court as follows:

1. On June 23, 1982, Petitioner requested leave of this Court to file in the trial court a petition for writ of error coram nobis which would present two pieces of newly discovered evidence to the trial court. On September 9, 1982, this court denied the petition for writ of error coram nobis without opinion, with Justices Sundberg and Ehrlich dissenting.

2. Because there was no written opinion, the reasons for the Court's denial are unknown. At the very least, Petitioner respectfully requests a clarification of the court's order which would state the reasons for denial. Such a clarification is particularly important in light of the fact that the standard for prejudice that must be shown in a coram nobis proceeding in a death case under Florida law is unclear. Compare Hallman v. State, 371 So.2d 482 (Fla. 1979) (opinion of Justices Alderman, England, Adkins and Sundberg) with the concurring and dissenting opinions of Justices Overton, Boyd and Hatchett therein. Also, see ¶ 5, infra. Moreover, in a death case where the court is divided, it is particularly important that the court state the reasons for its rulings so that the parties and public understand the court's rationale. Gardner v. Florida, 430 U.S. 349 (1977).

3. There was no question that the new evidence sought to be presented was "newly discovered" since it did not exist at the time of trial. One can only assume, therefore, that the instant denial was based on Petitioner's failure to allege sufficient prejudice.

4. If the denial was based on Petitioner's failure to show sufficient prejudice, this Court may have overlooked its recent decision in Jaramillo

v. State, Case No. 60,570 (Fla. July 8, 1982), which held that an explained fingerprint is insufficient to sustain a conviction. If the newly discovered evidence were to be considered and proved, the only remaining evidence against Petitioner would be an explained fingerprint and blood consistent with his, as well as at least one third of the population. Thus, the evidence against Petitioner would be insufficient to sustain a conviction. Clearly, even under the strictest standard, sufficient prejudice has been alleged.

5. More significantly, this Court's order did not deny Petitioner leave to file a coram nobis petition as requested, but denied the petition itself, although it had not been nor should it have been presented to this Court for initial determination. The result is that Petitioner has been denied the opportunity to present evidence which would substantially alter the trial evidence, if not conclusively prevent the entry of judgment against him. This new evidence would at the very least bear substantially on the appropriateness of the death penalty. As Justices Overton, Boyd, and Hatchett explained in their partial concurrence and partial dissent in Hallman v. State, 371 So.2d 482, 486 (Fla. 1979), substantial new evidence may not be controlling, "but it is a material and relevant factor which should be considered in determining the appropriateness of the death sentence." Id. at 487. If Justices Overton and Boyd are still of this view (and they there describe the opposite view as "totally wrong"), the majority of this Court would grant Petitioner the relief he seeks, at least in part.

It must be remembered that the death sentence in this case was affirmed by a narrow 4-2 margin of Supreme Court justices, with the dissent based upon sufficiency of the evidence. Peek v. State, 371 So.2d 482 (Fla. 1979). The new evidence which disproves the scientific evidence which comprised the State's most crucial evidence at trial must at least be considered in determining the appropriateness of the death penalty. Hallman, supra (Overton, Boyd, and Hatchett). Justice Overton, in a distinguished and scholarly opinion explained the view of three members of this Court concerning the appropriate standard of prejudice in a case such as this:

> A death case should be an exception to the 'conclusiveness test.' In my view, the rigid application of the 'conclusiveness test' is not proper in cases where the death penalty has been imposed. As Mr. Justice Stevens said in writing for the plurality in Gardner v. Florida, 430 U.S. 349, 351 (1977), the

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> death penalty is different from any other means of punishment, both in its severety and finality. I also believe our failure to consider these allegations on the merits at the sentencing phase will result in a weakening of our death penalty statute and could lead to a reversal of this cause under the principles expounded by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978). The majority in Lockett stated that: 'The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases.' 438 U.S. at 605.
>
> In conclusion, the majority's mistake in this case is not allowing [the new evidence] to be considered on its merits in regard to the appropriateness of the death penalty in this cause.

Id. at 487. The view of Justices Overton, Boyd, and Hatchett was recently proved correct by the United States Supreme Court in Eddings v. Oklahoma, 50 U.S.L.W. 4161 (1982), where the Court held that the sentencing authority must consider in mitigation any aspect of Defendant's character and any of the circumstances of the offence. A state procedural rule which denies a defendant the opportunity to present relevant and reliable evidence at sentencing in a death case is unconstitutional. Green v. Georgia, 442 U.S. 95 (1979). To deny Defendant the opportunity to present this vital new evidence to the sentencing authority clearly violates his Sixth, Eighth, and Fourteenth Amendment rights.

In sum, the Court's order, if allowed to stand, would deny a full and fair hearing to a death-sentenced individual who was convicted and sentenced substantially upon scientific evidence of the caliber of the proposition that the earth is flat. We now know that the earth is round. We also know that the physical evidence at trial was probably mixed up and the hair analysis was done incorrectly. As Justices Overton, Boyd, and Hatchett held in Hallman, the death penalty is unique, and all of the evidence must be considered prior to imposing it. That has not occurred here. The new evidence should at least be considered for the appropriateness of the penalty. Petitioner respectfully requests that rehearing be granted and this cause be set for oral argument.

Respectfully submitted,

Edward S. Stafman
224 West Fourth Avenue
Tallahassee, Florida 32301
(904) 222-5029

ESS/mmc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been sent by U.S. mail on September 29th, 1982, to:

Charles Corces
Assistant Attorney General
Tampa, Florida

Edward S. Stafman

ESS/mmc

IN THE SUPREME COURT OF FLORIDA

TUESDAY, NOVEMBER 16, 1982

ANTHONY RAY PEEK, **

Petitioner, **

vs. ** CASE NO. 62,234

STATE OF FLORIDA, **

Respondent. **

On consideration of the petition for rehearing and/or clarification filed by attorney for petitioner,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

cc: Edward S. Stafman, Esquire
Charles Corces, Jr., Esquire

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